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THE RIGHTS OF UNWED FATHERS ARE BEING VIOLATED UNDER CALIFORNIA'S STATUTORY SCHEME IN LIGHT OF THE UNITED STATES SUPREME COURT DECISION IN *CABAN V. MOHAMMED*

I. INTRODUCTION

Early in the 1970's, the United States Supreme Court began to recognize the rights of unwed fathers to maintain a parent-child relationship with their children.¹ Historically, an unmarried father had little or no rights with respect to his child, despite the fact that he had many responsibilities toward the child.² Many states neither required that an unwed father be notified of a pending adoption of his child, nor that he be given an opportunity to be heard at such an adoption proceeding.³ In the majority of states, the unwed father's consent to the adoption was irrelevant.⁴ Employing the due process and equal protection clauses of the fourteenth amendment, the Court has accomplished a great deal during the last decade to equalize the positions of unmarried fathers and married fathers in terms of maintaining the parent-child relationship.⁵ Unwed fathers, however, do not yet have full parental rights; furthermore, California appears to deny these fathers rights they are entitled to as found by the Supreme Court.⁶

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1. The terms unwed and unmarried are used throughout to refer to parents of a child who are not married to each other. One or both of the parents may be married to another person who is not the parent of the child.

2. Issac, *Adopting a Child Today*, 50 MINN. L. REV. 1071 (1966).

3. See Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581, 1584 n.20 (1972).

4. As of 1973, only 12 states, through statutes or case law, had provided for the consent of the unwed father to his child's adoption. See Comment, *Protecting the Putative Father's Rights After Stanley v. Illinois: Problems in Implementation*, 13 J. FAM. L. 115, 138-39 (1973).

5. See *infra* notes 7-26 and accompanying text.

6. In *W.E.J. v. Superior Court*, 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (1979), the Court of Appeal for the Second District upheld the constitutionality of CAL. CIV. CODE §§ 224, 7004, and 7017 which discriminate between natural mothers and fathers for the purpose of unmarried parental consent to adoption. The unwed father is de-

II. BACKGROUND

The unwed father now has many rights with respect to his child. The following cases outline the development of the unwed father's rights throughout the 1970's.

The Court first focused on the rights of unmarried fathers in *Stanley v. Illinois*.⁷ Relying on both the equal protection and the due process clauses of the Constitution, the Court held that an unwed father's children may not be taken from him before he has been afforded a fitness hearing similar to the hearing given to all other parents. Under Illinois law, unmarried fathers were presumed unfit to raise their children, while "married fathers—whether divorced, widowed, or separated—and mothers—even if unwed . . . [were presumed] fit to raise their children."⁸ The Court struck down the presumption against unmarried fathers and held that under the due process clause a finding of unfitness must be based on individualized proof.⁹ Moreover, denying a fitness hearing to unmarried fathers while granting it to other parents is contrary to the equal protection clause.¹⁰

In the 1978 decision of *Quilloin v. Walcott*,¹¹ the Court upheld a Georgia adoption statute¹² that gave only the unmarried mother the power to veto the adoption of her child. Under the statute, however, the unwed father could obtain the power to prevent his child's adoption simply by legitimating his child.¹³ In *Quilloin*, the child had remained in the cus-

prived of the right to withhold his consent where he and the mother have not attempted to marry each other, or where he has not received the child into his home and openly held out the child as his natural child.

7. 405 U.S. 645 (1972).

8. *Id.* at 647.

9. *Id.* at 649-58.

10. *Id.* at 658.

11. 434 U.S. 246 (1978).

12. GA. CODE § 74-203 (1981 Revision) reads: "The mother of an illegitimate child shall be entitled to the possession of the child, unless the father shall legitimate him as before provided. Being the only recognized parent, she may exercise all the parental power." (Georgia incorporates the chapter with the section of the code. Chapter 74, section 203 is, thus, referred to as § 74-203).

13. Legitimation entails merely petitioning the court to declare the child legitimate.

A father of an illegitimate child may render the same legitimate by petitioning the superior court of the county of his residence for legitimation of the child. The petition shall set forth the name, age, and sex of the child, the name of the mother, and, if the father desires the name of the child to be changed, the new name. If the mother is alive, she shall have

tody of his mother since his birth, and the father had not sought to legitimate his son until the petition for adoption was filed by the mother's husband. As the natural father had not taken on any of the daily supervision or care of his child and was not seeking custody, the Court had no difficulty finding that the interests of such fathers are distinguishable from the interests of divorced or married fathers. Equal protection principles, according to the Court, do not require that unwed fathers with Quilloin's attributes be given equal rights to veto an adoption.¹⁴

Along with *Stanley* and *Quilloin*, the Court has decided several cases dealing with gender-based discrimination which have been instrumental in securing the rights of unmarried fathers. *Reed v. Reed*¹⁵ established that classifications based on sex are "subject to scrutiny under the Equal Protection Clause."¹⁶ While the Court has not yet applied strict scrutiny to gender-based classifications, in *Frontiero v. Richardson*,¹⁷ a plurality of the Court held that sex constitutes a suspect classification, and that gender-based distinctions are subject to strict scrutiny.¹⁸ However, as a majority vote was not obtained

notice of the petition for legitimation

GA. CODE § 19-7-22 (1982 Revision).

14. 434 U.S. at 255-56.

15. 404 U.S. 71 (1971).

16. *Id.* at 75.

17. 411 U.S. 677 (1973). See Note, *Frontiero v. Richardson: Characterization of Sex-Based Classification*, 6 COLUM. HUM. RIGHTS L. REV. 239 (1974); Note, *Constitutional Law—Due Process—United States Supreme Court In Plurality Opinion Names Sex a Suspect Classification Requiring Compelling Interest Test—Frontiero v. Richardson*, 411 U.S. 677 (1973), 7 CREIGHTON L. REV. 69 (1973); Note, *Constitutional Law—Fifth Amendment Due Process—Sex Discrimination—Suspect Classification*, 12 DUQ. L. REV. 982 (1974).

18. Justices Douglas, Marshall, and White joined Justice Brennan's opinion which held that sex is an inherently suspect class, and therefore, subject to strict scrutiny. 411 U.S. at 682. Justice Stewart, in a separate opinion, concurred in the Court's holding that the statutes at issue were invalid under *Reed v. Reed* as invidious discrimination. *Id.* at 691. Justice Powell, joined by Chief Justice Burger, and Justice Blackmun, noted that because the Equal Rights Amendment had been submitted to the states for ratification and would resolve the issue, deciding whether sex should be a suspect class would result in judicial pre-emption of the legislative process. *Id.* at 691-92.

For an excellent discussion of the intricacies of the *Frontiero* decision see Comment, *Frontiero v. Richardson, Uniform Services Fringe Benefit Statute Which Presumes Spouses of Male Members to be Dependent, but Requires Spouses of Female Members to be Dependent in Fact, is Violative of Due Process*, 5 LOY. U. CHI. L.J. 295 (1974); Comment, *Plurality of Court Decides that Sex-Based Classifications are "Suspect."* *Frontiero v. Richardson*, 5 RUT.-CAM. L. REV. 348 (1973).

in this case, that level of scrutiny has not been applied.¹⁹ Instead, the Court has applied an intermediate level of scrutiny²⁰ as articulated in *Craig v. Boren*.²¹ "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."²² A statute dealing with unwed parental consent to adoption, which distinguishes one class of parents from another on the basis of sex must therefore be substantially related to furthering important state interests.

In 1979, a major breakthrough occurred for fathers who had not been required to consent to the adoption of their children. In *Caban v. Mohammed*,²³ the Supreme Court overturned a New York adoption statute that required the consent of both the parents before their child could be adopted, if that child had been born in wedlock.²⁴ If that child had not been born in wedlock, only the unmarried mother's consent was required. The Court found that this statute clearly distinguished between unmarried parents who were male and those who were female.²⁵ Additionally, the Court determined that this sex based distinction bore no substantial relationship to

19. See Lombard, *Sex: A Classification in Search of Strict Scrutiny*, 21 WAYNE L. REV. 1355 (1975); Comment, *Sex Discrimination and Equal Protection: An Analysis of Constitutional Approaches to Achieve Equal Rights for Women*, 38 ALB. L. REV. 66 (1973).

20. Classifications falling under the intermediate level of scrutiny must be substantially related to furthering important state interests. For a discussion of the three levels of scrutiny applied by the Court and specifically the development of the intermediate level of scrutiny see Weinhaus, *Substantive Rights Of The Unwed Father: The Boundaries are Defined*, 19 J. FAM. L. 445 (1980); Comment, *Caban v. Mohammed: Extending The Rights Of Unwed Fathers*, 46 BROOKLYN L. REV. 95 (1979); Comment, *Gender-Based Discrimination and a Developing Standard of Equal Protection Analysis*, 46 U. CIN. L. REV. 572 (1977); Note, *Adoption: The Constitutional Rights of Unwed Fathers*, 40 LA. L. REV. 923 (1980).

21. 429 U.S. 190 (1976).

22. *Id.* at 197.

23. 441 U.S. 380 (1979).

24. See N.Y. DOM. REL. LAW § 111 (McKinney 1977) which provides that: "[C]onsent to adoption shall be required as follows: . . . (b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock; [and] (c) Of the mother whether adult or infant, of a child born out of wedlock"

25. 441 U.S. at 388. The Court said that it was clear that section 111 treated unmarried parents differently according to their sex from the fact that the father could not adopt his children without their mother's consent, whereas adoption by the mother could be blocked only if the father could show that the adoption would not be in the children's best interests.

any important state interest, and therefore, was in violation of fourteenth amendment equal protection principles.²⁶

III. THE CALIFORNIA CASE AND STATUTORY SCHEME

California's adoption statutes²⁷ are similar to New York's invalidated statute in their treatment of unmarried parental consent for the purpose of adoption. In view of *Caban*, one would have expected California's adoption statutes to fall when challenged on constitutional grounds in the state's courts. This was not the case in *W.E.J. v. Superior Court*,²⁸ however.

A. *Facts of W.E.J.*

On August 23, 1978 Baby Boy G. was born to an unwed couple—Falaniko L., the father, and Janis G., the mother.²⁹ The next day, the mother released their baby to William and Virginia J., and they filed a petition for adoption of Baby Boy G. Falaniko, however, appeared in the proceeding seeking custody of his child in order to adopt the child. His wife, Margaret L., who was unable to bear children, testified that she wanted, and would love her husband's child despite the circumstances of the child's conception. The superior court granted custody to the father. From the language of the trial court's ruling, the Court of Appeal reasoned that the trial court must have concluded that Falaniko was entitled to a grant of custody in light of *Caban*.³⁰ Once granted custody, Falaniko by definition would become a presumed father and would then be in a position to block the adoption of Baby Boy G. by withholding his consent.³¹

26. *Id.* at 388-94.

27. CAL. CIV. CODE §§ 224, 7004, and 7017 (West 1975). These statutes provide that an unwed father cannot block the adoption of his child by withholding his consent unless he is a presumed father. To become a presumed father, he must have gone through an apparently valid marriage ceremony with the mother or taken the child into his home and held the child out as his natural child.

28. 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (1979).

29. *Id.* at 305-06, 160 Cal. Rptr. at 864.

30. *Id.* at 306-07, 160 Cal. Rptr. at 864.

31. *Id.* at 307, 160 Cal. Rptr. at 864. Under CAL. CIV. CODE § 7004(a)(4) (West Supp. 1982), an unwed father may object to the adoption of his child by withholding his consent only if he is a presumed father. An unwed father will become a presumed father if he obtains custody of his child.

B. *Comparison of New York's Invalidated Statute and the California Statutory Scheme at Issue in W.E.J.—Similar but not Identical*

Under the invalid New York law, parents were treated differently for the purpose of unwed parental consent to adoption on the basis of sex. The statute reads in pertinent part: "[C]onsent to adoption shall be required as follows: . . . (b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock; [and] (c) Of the mother, whether adult or infant, of a child born out of wedlock"³² Since the state was unable to show that the distinction between the rights of unmarried fathers and unmarried mothers was substantially related to an important state interest, this statute fell as "another example of 'overbroad generalizations' in gender-based classifications."³³ Adoption by the father was impermissible without the mother's consent—whether she was married or not—yet the unmarried father could block an adoption by the mother only if he could show that such adoption was not in the best interest of the child.³⁴

The more complicated California statutory scheme at issue in *W.E.J.* produces results similar to those of the unconstitutional New York statute. California Civil Code section 224 states that: "A child having a presumed father . . . cannot be adopted without the consent of its parents if living"³⁵ The adoption of a child without a presumed father, however, would only require the mother's consent.³⁶ An unmarried father will qualify as a presumed father under section 7004(a) if he has gone through an apparently valid marriage ceremony with the mother, or taken the child into his home and held the child out as his natural child.³⁷

It is evident that unlike New York's statutes, the California statutory scheme does allow some unmarried fathers to object to the adoption of their children. The court of appeal in *W.E.J.* seems to have reasoned that because of this difference, the California statutes are saved from being unconstitutional under *Caban*. Requiring the consent of only those un-

32. N.Y. DOM. REL. LAW § 111 (McKinney 1977).

33. *Caban v. Mohammed*, 441 U.S. at 394.

34. *Id.* at 385-87.

35. CAL. CIV. CODE § 224 (West 1982).

36. CAL. CIV. CODE § 7017 (West Supp. 1982).

37. CAL. CIV. CODE § 7004 (West Supp. 1982).

married fathers who meet the narrow criteria of presumed fathers is not enough to prevent the California statutes from resulting in overbroad gender-based discrimination.³⁸ The fact remains that all mothers, regardless of their marital status, must give their consent before an adoption can take place, but not all fathers are allowed this right.

IV. CALIFORNIA'S STATUTES FALL SHORT OF *Caban* REQUIREMENTS

Several justifications for upholding the California statutory scheme are offered by the court of appeal in *W.E.J.* First, the court points out that there is a notice provision under California law regarding proceedings to terminate parental control; therefore the state has not violated *Stanley*.³⁹ In a further attempt to buttress its position, the court analogized California's statutes to those of Georgia's which were upheld in *Quilloin*. Finally, the *W.E.J.* court alludes to a possible important state interest behind the classification created by the California statutes—protecting the child from a parent who would veto his adoption on a basis other than the best interests of the child—but fails to demonstrate how the classification is substantially related to this articulated interest.⁴⁰ If the gender-based distinction is not substantially related to an important state interest, the core requirement of *Caban*, then the statute would be unconstitutional.⁴¹

A. Notice Requirement

The court in *W.E.J.* pointed out that the California statutes meet the requirement of due process as articulated in *Stanley*. Due process requires notice to the natural father and

38. The criteria is so difficult for unwed fathers to meet that in fact, all the mother has to do is say no to the father's proposal of marriage and refuse to allow him to take the child into his home in order to frustrate his efforts to become a presumed father. See also *W.E.J. v. Superior Court*, 100 Cal. App. 3d at 323, 160 Cal. Rptr. at 875 (Jefferson, J., dissenting).

39. Apparently, the court of appeal was not offering the fact that before custody can be revoked the custodial parent is given notice, as a justification for denying unwed fathers *without custody* the power to veto an adoption. Instead, the court of appeal was pointing out that California has followed the guideline set up by the Supreme Court in *Stanley*.

40. *W.E.J. v. Superior Court*, 100 Cal. App. 3d at 314-15, 160 Cal. Rptr. at 869-70.

41. See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

a hearing on his fitness as a parent before his children may be taken from him. Section 235 of the California Civil Code⁴² does provide for an extensive service of process if an action to have a minor declared free from parental control is initiated. The termination of parental control proceedings, however, are not directly related to adoption proceedings involving non-presumed fathers. The unwed father, if he is a non-presumed father, by definition does not have custody of his child. He would therefore not be entitled to notice under section 235. The court of appeal was apparently addressing the entire Uniform Parentage Act when it pointed out that the California law meets the *Stanley* requirements.⁴³

B. *The Georgia Statutes*

The court of appeal in *W.E.J.* attempted to support the California statutes by likening them to the Georgia adoption statutes upheld by the Supreme Court in *Quilloin*. In Georgia, as in California, only the unmarried mother has the power to veto the adoption of her child.⁴⁴ According to the majority in *W.E.J.*, *Quilloin* "illustrates the principle that a father whose relationship to the child is only biological may be treated differently from a father who has established a family relationship with the child and mother."⁴⁵ The court, however, neglects to mention that to obtain veto power in Georgia, the father of the illegitimate child need only petition the court to

42. CAL. CIV. CODE § 235 (West 1982) requires that in an action to have a minor declared free from parental custody and control, service of citation is to be delivered to:

(a) The father or mother of such minor person, if his or her place of residence is known to the petitioner, or if the place of residence of such father or mother is not known to the petitioner, then the grandparents and adult brothers, sisters, uncles, aunts, and first cousins of such minor person, if there are any and if their residences and relationships to such person are known to the petitioner, shall be notified of the proceedings by service of a citation advising such person or persons that they may appear at the time and place stated in such citation . . . (b) If the father or mother of such minor person or any person alleged to be or claiming to be the father or mother cannot, with reasonable diligence be served as provided in subdivision (a), or if his or her place of residence is not known to the petitioner . . . the court shall make an order that service be made by publication . . .

43. *W.E.J. v. Superior Court*, 100 Cal. App. 3d at 313, 160 Cal. Rptr. at 868.

44. GA. CODE § 74-203 [19-7-25] (1982).

45. See *W.E.J. v. Superior Court*, 100 Cal. App. 3d at 313, 160 Cal. Rptr. at 878.

legitimate his child under the Georgia statute.⁴⁶ Thus, *Quilloin* stands more for the proposition that fathers who have not undertaken the simple task of legitimating their children may be treated differently from those fathers who have done so.

Furthermore, as Justice Jefferson pointed out in his dissent in *W.E.J.* the holding in *Quilloin* was based on the particular fact situation before the Court at the time.⁴⁷ In *Quilloin* the child sought to be adopted was twelve years old when the case came to trial. The father, Quilloin, had not sought to legitimate his child during the child's first eleven years. Only after the mother's husband filed a petition for the adoption of the child did Quilloin petition the Georgia court to have his child legitimated. Moreover, Quilloin was not even seeking custody of his child at the time. His only objection was to the mother's husband's adoption of the child—he did not mind if the child continued to live with the mother and her husband. Thus, the Court upheld the Georgia statutes as applied to Quilloin.

C. *Promoting the Child's Best Interests*

Caban requires that a gender-based classification be substantially related or "closely attuned" to an important state interest.⁴⁸ *W.E.J.* suggests that the important state interest at stake is the protection of a child from a parent who would veto the child's adoption on bases other than a natural parental interest in the child's welfare.⁴⁹ According to *W.E.J.*, California's classifications based on the attempted marriage and the undertaking of the care of the child, "contain a substantial proportion of fathers who are strangers to the child and whose objection to adoption will be based on something other

46. See GA. CODE § 74-103 [19-7-22] (1982).

47. *W.E.J. v. Superior Court*, 100 Cal. App. 3d at 325, 160 Cal. Rptr. at 876.

48. 441 U.S. at 392-93 n.13; see also *Reed v. Reed*, 404 U.S. 71, 75 (1971). The standard that gender-based discrimination must meet to withstand constitutional challenge has been firmly entrenched by innumerable cases both in the federal and state courts. The following is a list of United States Supreme Court cases which have referred to this standard: *Caban v. Mohammed*, 441 U.S. 380 (1979); *Califano v. Webster*, 430 U.S. 313 (1977); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *Stanton v. Stanton*, 421 U.S. 7 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Reed v. Reed*, 404 U.S. 71 (1971).

49. *W.E.J. v. Superior Court*, 100 Cal. App. 3d at 314, 160 Cal. Rptr. at 869.

than a mature consideration of the child's best interest."⁵⁰ Thus, the court concludes that the presumed fathers classification "does not go substantially beyond the protection of [the state's] interest."⁵¹

The classification created by the California statutes is too broad to achieve the state's interest in protecting children from parents who do not have their children's best interests in mind when seeking to prevent an adoption. The distinction drawn between unwed fathers who are presumed fathers and those who are not, precludes many genuinely concerned fathers from effectively objecting to an adoption. The statutes also allow mothers to prevent unmarried fathers from becoming presumed fathers, regardless of how much interest such fathers may have shown in their children's welfare.

1. Objection is the Result of a Natural Parental Interest

While the court in *W.E.J.* agreed with the legislature that "non-presumed fathers" will be strangers to their children and will block an adoption based on considerations not in such children's best interests,⁵² the Supreme Court in *Caban* considered the fact that unmarried fathers may object to adoptions if given the power to do so and found no basis to believe that this objection would be the result of anything other than a concern for the best interests of the child. As the Court pointed out, an unwed father's objection to an adoption "usually is the result of a natural parental interest shared by both genders alike; it is not a manifestation of any profound difference between the affection and concern of mothers and fathers for their children."⁵³

There is no apparent reason to believe that only fathers who have married their child's mother or who have under-

50. *Id.*

51. *Id.* at 315.

52. In support of its assertion, the court even relies on the facts of *Caban* suggesting that since *Caban* had lived with his children and their mother for several years, he would have qualified as a presumed father in California. 100 Cal. App. 3d at 314, 160 Cal. Rptr. at 869. See CAL. CIV. CODE § 7004(a)(4). Thus, *Caban* could have blocked the adoption of his children had they lived in California. The *W.E.J.* majority, however, ignores the fact that *Caban* invalidated New York's statute as overbroad and as such *Caban's* facts are only of secondary importance. California statutes must satisfy the substantial relationship test.

53. 441 U.S. at 391-92.

taken to care for the child in a common home have a natural parental interest in the welfare of their children. Concern for a child may be manifested in numerous ways in addition to those required by the California statutes. Although California requires an actual marriage ceremony to have taken place between the parents, concern may be manifested even if the attempt at marriage by the father is not successful. A father who has tried to gain custody of his child but has failed is also manifesting concern for that child. The distinction drawn by the California statutes goes substantially beyond the protection of the articulated state interests by depriving many deserving fathers of the ability to block their children's adoptions.

2. Loving Fathers may be Excluded While Alienated Mothers are Given Power to Cut Off Fathers' Rights

In addition to the fact that there is no evidence that non-presumed fathers would be more likely than presumed fathers to veto adoptions without having the child's best interests in mind, California's statutory scheme precludes many deserving fathers from obtaining such veto power. A loving father can be excluded from the decision as to who will be able to adopt his child by a mother who has severed her connection with their child immediately after the child's birth.⁵⁴ These fathers may have done all they possibly can to demonstrate their willingness to take responsibility for their children, yet they cannot qualify for presumed father status. The classification that precludes these fathers is the same one that was intended to protect the children from parents who would block the adoption without the child's welfare in mind.

The inequity of the invalidated New York statute in *Caban* is the same inequity present in the California statutes. New York's classification "both excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers."⁵⁵ The focus of adoption legislation should be on whether the child's parent is genuinely concerned with the best interests of

54. The mother of the baby in *W.E.J.* released her child to another couple the day after the child's birth. 100 Cal. App. 3d at 306, 160 Cal. Rptr. at 864.

55. 441 U.S. at 394.

that child. Whether the unwed parent is a female or a male should not be a determining factor.

Under the California statutes, a father who asked the mother to marry him or who has offered to take his child into his home and support that child may be prevented from obtaining presumed father status merely by the mother's refusal to accept his offers. In *Adoption of Marie R.*,⁵⁶ the same court that decided *W.E.J.* ruled that such offers are not enough to qualify the man as a presumed father, regardless of his efforts in that respect.⁵⁷ The facts of *Marie R.* are similar to those of *W.E.J.* Immediately after Marie R.'s birth, her unmarried mother released her to a couple who wished to adopt her. The child's purported father attempted to intervene, however, offering to support and take his daughter into his home. This offer was refused by the mother. At the adoption proceeding, the father objected, contending that he should qualify as a presumed father on the basis of his efforts to take his child into his home. The majority found that only the mother's consent was required for the adoption, holding the mother's frustration of the father's efforts immaterial. The court rejected the argument that such effort amounted to a constructive taking of the child into the father's home which would qualify him for presumed father status.⁵⁸ The court pointed out that a "mother may, by her conduct, prevent a natural father from securing even the minimal contact with the child Absent even the minimal contact . . . there can be no receipt, constructive or otherwise, into the home of a purported father."⁵⁹

The injustice done to a concerned and loving father by this classification cannot be expressed with any more emphasis than was done in the *W.E.J.* dissent.

The invidious nature of the classification upheld by the majority in the instant case is that the unmarried mother—who does not want the custody of her child and the responsibility which goes with such custody—is given the right to consent to an adoption of the child by nonparents and also the right to effectively preclude the unmarried father from obtaining custody and vetoing an adoption simply by frustrating all efforts of the father to

56. 79 Cal. App. 3d 624, 145 Cal. Rptr. 122 (1978).

57. *Id.* at 630, 145 Cal. Rptr. at 126.

58. *But see id.* at 631-38, 145 Cal. Rptr. at 126-30 (Jefferson, J. dissenting).

59. *Id.* at 630, 145 Cal. Rptr. at 126.

obtain custody and thus put himself into a position where his consent to an adoption is required as a presumed natural father⁶⁰

D. *Other State Interests*

Aside from protecting a child's best interests, there are two possible state interests that may be promoted by an adoption statute. First, delay can result in the adoption process if the consent of an unavailable father is required, although the statutes do not directly seek to prevent this delay. Second, an adoption statute can be drawn so as to foster the parent-child relationship as an important state interest. However, the California statutory scheme does not promote such relationships; consequently, the spirit of the Uniform Parentage Act has not been carried forth.⁶¹ California's statutes therefore, are not substantially related to either of these interests.

1. *Classification not Drawn to Curtail Problem of Delay*

Caban v. Mohammed discussed a possible state interest in avoiding the delay which might result if the consent of absent unmarried fathers is required to an adoption of their children.⁶² The California statutory scheme is not substantially related to facilitating adoptions by avoiding this delay, however. Searching for fathers whose whereabouts are not known would result in considerable delay in the adoption process and could foreseeably cause some adoption petitions to be dropped.⁶³ Although the court in *W.E.J.* did not discuss the stagnation problem, the Supreme Court in *Caban* indicated that a statutory classification could be drawn which

60. 100 Cal. App. 3d at 324, 160 Cal. Rptr. at 875.

61. See CAL. CIV. CODE §§ 7000-7018 (West 1975).

Under the Uniform Parentage Act . . . the "child and parent relationships" extend equally to every child and to every parent regardless of the marital status of the parent. All statutory references to "legitimacy" and "illegitimacy" are eliminated. The major premise of the Act is to provide for substantive equality of children regardless of the status of the parents. The right-duty relationship existing between the parent and child are equalized without reference to the marital status without regard to sex.

Griffith v. Gibson, 73 Cal. App. 3d 465, 470, 142 Cal. Rptr. 176, 179 (1977) (footnotes omitted).

62. 441 U.S. at 390-91.

63. *Id.*

would avoid this problem by not requiring the consent of those unmarried fathers who had never come forward and shown an interest in their children.⁶⁴ It is obvious from the facts of *W.E.J.* that the California statutes have a greater effect than merely avoiding the impediment of locating the unwed father to secure his consent. In *W.E.J.* the father's whereabouts were well known. He was in court seeking custody of his child and seeking to prevent his child's adoption. Yet, this father was precluded from exercising any veto power over the adoption. The statutes make no distinction between the unmarried father who has come forward and is seeking custody and those fathers who have not. Therefore, the classification is not substantially related to the facilitation of adoptions.

2. *Policy Behind the Uniform Parentage Act*

The California statutes here at issue are part of the Uniform Parentage Act⁶⁵ adopted by California in 1976. As the dissent in *W.E.J.* points out, the public policy behind the Act was to eliminate promotion of legitimacy as an important state interest.⁶⁶ Promoting the parent-child relationship, whether the parent is married or not replaces legitimacy as an important state interest under the Act.⁶⁷

The California statutes are not substantially related to promoting the establishment of the parent-child relationship as envisioned by the Act. Under the classification created by these statutes, the unwed father in many cases is unable to develop a relationship with his child because he, through no fault of his own, will be unable to qualify for presumed father status under section 7004. Depriving the unwed father of his chance to develop a parent-child relationship simply because the mother has decided to forego her opportunity to develop such a relationship and has prevented the father from gaining custody, is non-justifiable.

64. *Id.* at 392.

65. See CAL. CIV. CODE §§ 7000-7018 (West 1975).

66. 100 Cal. App. 3d at 317-18, 160 Cal. Rptr. at 871-72.

67. See *id.* at 311, 160 Cal. Rptr. at 862; Adoption of Marie R., 79 Cal. App. 3d 624, 626, 145 Cal. Rptr. 122, 123-124 (1978).

V. CALIFORNIA'S STATUTES SHOULD BE REWRITTEN TO BRING THEM INTO COMPLIANCE WITH THE HOLDING IN *Caban*

California's statutes which deal with unwed parental consent to adoption are not substantially related to an important state interest, and therefore, should be rewritten so as to comply with the *Caban* decision. These statutes dealing with unmarried parental consent to adoption should promote the parent-child relationship in the spirit of the Uniform Parentage Act. Additionally, the legislature should strive to ensure that all interests are protected by the distinctions drawn; including those of the state, the unmarried father and mother, and the child. Finally, every classification should be substantially related to the furtherance of important state interests.

A. *Proposed Statutory Revisions*

It may be that aligning the California statutes with the Supreme Court's mandate in *Caban* entails no revision at all. The court in *W.E.J.* refused to interpret section 7017(d) of the California Civil Code as requiring a grant of custody to a natural father who requests such custody for the purpose of qualifying as a presumed father enabling him to veto his child's adoption. If a higher court were to find that a trial court must grant custody to an unwed father who requests such custody for the purpose of qualifying as a presumed father, then the statutes would comply with *Caban*.

Alternatively, the legislature could amend the statutes to require giving an unmarried father custody of his child when he asks for it so that he can become a presumed father. Since those unmarried fathers with an interest in their children would manifest this interest by seeking custody of their children, they would no longer be prevented from obtaining veto power over the adoption of their children.

Another possible solution to the constitutional dilemma presented by the California statutes would be to enact a statute requiring both parents' consent to the adoption of their child in all cases. Such a statute would completely avoid the problem of gender-based distinctions. Requiring both parents' consent, however, raises other problems which would make this requirement undesirable. As previously discussed, there would be a delay problem in securing the consent of fathers whose whereabouts were unknown. The situation might also

arise where the unmarried father, who has not lived up to his support obligations and has not manifested any interest in the child, would be allowed to prevent the adoption merely by withholding his consent. He should be required to show that the adoption is not in the best interests of the child.

Another alternative would be to require the consent of both the mother and the father where he has sought custody of his child or has sought to adopt his child and the mother has frustrated his efforts to do so.⁶⁸ This requirement would be substantially related to the furthering of the important state interest of allowing only those parents with a genuine interest in their children's well-being to veto an adoption. Those fathers who have a natural parental interest in their children will have manifested this interest by seeking custody or adoption and they will not be precluded from exercising their power to withhold consent if they object to the adoption. The mother will not be forced to retain custody of a child she cannot or does not want to support by a father who has been unwilling to take responsibility for the child. If the father has not sought to obtain custody or to adopt the child and the mother has not frustrated the father's efforts to do so, then only the mother's consent would be required. Additionally, if the father is turned down after a finding of unfitness as a parent, his consent to an adoption would not be necessary.⁶⁹

VI. CONCLUSION

California's statutory scheme dealing with unwed paren-

68. There are, of course, many possible variations of these proposed revisions. The scope of this comment, however, does not permit full development of each one. For a further discussion of statutory revision in light of *Caban*, see Note, *Putative Fathers: Unwed, but no Longer Unprotected*, 8 HOFSTRA L. REV. 425 (1980).

69. There are two other possibilities for adoption statutes, but they are not viable alternatives. The first possibility would be to draft a statute requiring only the consent of one parent to the adoption—regardless of sex or who has custody. Besides being unconstitutional, this alternative is highly undesirable. *Stanley v. Illinois* established that a hearing on the fitness of the parent must be held before custody is terminated. 405 U.S. at 649-53. If only one parent's consent were to be required, the father or mother could relinquish all parental rights to the child—regardless of whether the other parent had manifested an interest in the child.

The second possibility would be to enact a statute foregoing the consent requirement altogether. Although such a statute would speed up the adoption process, this statute would similarly be unconstitutional under *Stanley* because the custodial parent must be given notice and a fitness hearing before custody of his children may be terminated. *Id.*

tal consent to adoption requires redrafting. This comment has attempted to delineate the precautions which should be taken when the legislature draws distinctions between classes of unmarried parents for the purpose of determining whether or not the parent's consent to adoption is necessary. The spirit of the Uniform Parentage Act should be a major consideration. Classifications should be created to promote the parent-child relationship—regardless of the parent's sex or marital status. The consent of those parents who have manifested a genuine parental interest in their children should be required before an adoption of their children can take place. The legislature does not, however, have to give all parents the power to object to an adoption by withholding their consent. For example, an unknown or unavailable parent's consent need not be secured, enabling the state to avoid the problem of delaying the adoption proceeding. Great care should be taken, however, to ensure that these limitations do not discriminate against parents who have done all that they possibly can to provide a home for their children. These parents should have a meaningful say in who can and cannot adopt their children. California's statutory scheme presently does not allow fathers who have a sincere parental interest in the well-being of their children to object to an adoption by withholding their consent. The rights of unwed fathers are, therefore, being violated under California's statutory scheme in light of the recent United States Supreme Court decision in *Caban v. Mohammed*.

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